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9 **BEFORE THE**
BOARD OF PHARMACY
10 **DEPARTMENT OF CONSUMER AFFAIRS**
11 **STATE OF CALIFORNIA**

12 **In the Matter of the Accusation Against:**

Case No. 4174

13 **MARY PAT HIGLEY**
14 **38 Lyndhurst**
Newport Beach, CA 92660

ACCUSATION

15 **Pharmacist License No. RPH 37064**

16 **Respondent.**

17
18 **Complainant alleges:**

19 **PARTIES**

20 1. Virginia Herold (Complainant) brings this Accusation solely in her official capacity
21 as the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs.

22 2. On or about December 4, 1981, the Board of Pharmacy issued Pharmacist License
23 No. RPH 37064 to Mary Pat Higley (Respondent). The Pharmacist License was in full force and
24 effect at all times relevant to the charges brought herein and will expire on September 30, 2012,
25 unless renewed.

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JURISDICTION

3. This Accusation is brought before the Board of Pharmacy (Board), Department of Consumer Affairs, under the authority of the following laws. All section references are to the Business and Professions Code unless otherwise indicated.

4. Section 118, subdivision (b), of the Code provides that the suspension, expiration, surrender, or cancellation of a license shall not deprive the Board of jurisdiction to proceed with a disciplinary action during the period within which the license may be renewed, restored, reissued or reinstated.

5. Section 4300, subdivision (a) of the Code states "Every license issued may be suspended or revoked."

STATUTORY PROVISIONS

6. Section 482 provides, in pertinent part, that when considering the suspension or revocation of a license under Section 490, each board shall take into account all competent evidence of rehabilitation furnished by the applicant or licensee.

7. Section 490 of the Code provides, in pertinent part, that a board may suspend or revoke a license on the ground that the licensee has been convicted of a crime substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued.

8. Section 493 of the Code states:

Notwithstanding any other provision of law, in a proceeding conducted by a board within the department pursuant to law to deny an application for a license or to suspend or revoke a license or otherwise take disciplinary action against a person who holds a license, upon the ground that the applicant or the licensee has been convicted of a crime substantially related to the qualifications, functions, and duties of the licensee in question, the record of conviction of the crime shall be conclusive evidence of the fact that the conviction occurred, but only of that fact, and the board may inquire into the circumstances surrounding the commission of the crime in order to fix the degree of discipline or to determine if the conviction is substantially related to the qualifications, functions, and duties of the licensee in question.

As used in this section, "license" includes "certificate," "permit," "authority," and "registration."

1 9. Section 4301 of the Code states:

2 The board shall take action against any holder of a license who is guilty of
3 unprofessional conduct or whose license has been procured by fraud or
4 misrepresentation or issued by mistake. Unprofessional conduct shall include, but is
5 not limited to, any of the following:

6
7 (h) The administering to oneself, of any controlled substance, or the use of any
8 dangerous drug or of alcoholic beverages to the extent or in a manner as to be
9 dangerous or injurious to oneself, to a person holding a license under this chapter, or
10 to any other person or to the public, or to the extent that the use impairs the ability of
11 the person to conduct with safety to the public the practice authorized by the license.

12
13 (k) The conviction of more than one misdemeanor or any felony involving the
14 use, consumption, or self-administration of any dangerous drug or alcoholic beverage,
15 or any combination of those substances.

16
17 (l) The conviction of a crime substantially related to the qualifications,
18 functions, and duties of a licensee under this chapter. The record of conviction of a
19 violation of Chapter 13 (commencing with Section 801) of Title 21 of the United
20 States Code regulating controlled substances or of a violation of the statutes of this
21 state regulating controlled substances or dangerous drugs shall be conclusive
22 evidence of unprofessional conduct. In all other cases, the record of conviction shall
23 be conclusive evidence only of the fact that the conviction occurred. The board may
24 inquire into the circumstances surrounding the commission of the crime, in order to
25 fix the degree of discipline or, in the case of a conviction not involving controlled
26 substances or dangerous drugs, to determine if the conviction is of an offense
27 substantially related to the qualifications, functions, and duties of a licensee under this
28 chapter. A plea or verdict of guilty or a conviction following a plea of nolo
 contendere is deemed to be a conviction within the meaning of this provision. The
 board may take action when the time for appeal has elapsed, or the judgment of
 conviction has been affirmed on appeal or when an order granting probation is made
 suspending the imposition of sentence, irrespective of a subsequent order under
 Section 1203.4 of the Penal Code allowing the person to withdraw his or her plea of
 guilty and to enter a plea of not guilty, or setting aside the verdict of guilty, or
 dismissing the accusation, information, or indictment.

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REGULATORY PROVISIONS

10. California Code of Regulations, title 16, section 1769, states:

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(b) When considering the suspension or revocation of a facility or a personal license on the ground that the licensee or the registrant has been convicted of a crime, the board, in evaluating the rehabilitation of such person and his present eligibility for a license will consider the following criteria:

(1) Nature and severity of the act(s) or offense(s).

(2) Total criminal record.

(3) The time that has elapsed since commission of the act(s) or offense(s).

(4) Whether the licensee has complied with all terms of parole, probation, restitution or any other sanctions lawfully imposed against the licensee.

(5) Evidence, if any, of rehabilitation submitted by the licensee.

11. California Code of Regulations, title 16, section 1770, states:

For the purpose of denial, suspension, or revocation of a personal or facility license pursuant to Division 1.5 (commencing with Section 475) of the Business and Professions Code, a crime or act shall be considered substantially related to the qualifications, functions or duties of a licensee or registrant if to a substantial degree it evidences present or potential unfitness of a licensee or registrant to perform the functions authorized by his license or registration in a manner consistent with the public health, safety, or welfare.

COST RECOVERY

12. Section 125.3 of the Code states, in pertinent part, that the Board may request the administrative law judge to direct a licentiate found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

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FIRST CAUSE FOR DISCIPLINE

(June 13, 2011 Criminal Conviction for Driving Under the Influence of Alcohol With a Blood Alcohol Content of 0.08% or More [BAC 0.20% on December 24, 2010])

13. Respondent has subjected her license to discipline under sections 490 and 4301, subdivision (l) of the Code in that she was convicted of a crime that is substantially related to the qualifications, duties, and functions of a pharmacist. The circumstances are as follows:

14. On or about June 13, 2011, in a criminal proceeding entitled *People of the State of California v. Mary Pat Higley*, in the Orange County Superior Court, Harbor Justice Center, Newport Beach Facility, in Case No. 11HM02706 M A, Respondent was convicted on her plea of guilty to violating Vehicle Code section 23152(b) (driving under the influence of alcohol with a blood alcohol content of 0.08% or more [BAC .20%]), a misdemeanor. As a result of Respondent's plea, the Court dismissed a charge that had originally been filed for violation of Vehicle Code sections 23152(a) (driving under the influence of alcohol).

15. The circumstances surrounding the conviction are that on or about December 24, 2010, at approximately 1040 hours, Newport Beach Police Department officers responded to the area of Lyndhurst and Montgomery in the City of Newport Beach, CA, regarding a female driver that was reportedly swerving all over the road and possibly collided with other vehicles. Upon arrival, officers observed a tan Lexus, CA License No. 5X0J234, partially parked on the sidewalk on the northwest corner of Lyndhurst and Montgomery. The vehicle was blocking traffic causing it to be a hazard in the roadway.

16. Officers approached the vehicle and observed the driver's side door open. The vehicle was not running, however, the keys were still in the ignition. Officers observed a female subject, later identified as Respondent, seated in the driver's seat. Officers asked Respondent what had occurred, and Respondent mumbled several unintelligible words and appeared to be extremely lethargic and confused. Officers asked Respondent if she was driving the vehicle and Respondent stated, "Yes, can I just go home?" Officers detected a strong odor of an alcoholic beverage emanating from Respondent's breath and person. Officers requested that Respondent step out of her vehicle in order to conduct an investigation of possible drunk driving and

1 Respondent was unable to get out of the vehicle. Two officers had to assist in removing
2 Respondent from the driver's seat of her vehicle. Respondent was unable to stand on her own
3 and was extremely unsteady, even with the officers' assistance. Officers noticed that Respondent
4 had red, watery eyes and a slurred speech. Officers asked Respondent if they could conduct a
5 pat-down search of her person for any weapons, and Respondent agreed. Officers located a wine
6 bottle opener with a cork still attached in the right front pocket of Respondent's jacket. Officers
7 instructed Respondent to sit on the curb. Respondent was unable to maintain her balance while
8 sitting on the curb and officers had to assist her in holding her up. Because of Respondent's level
9 of intoxication, and for her own safety, officers did not have Respondent submit to a field
10 sobriety test.

11 17. While still at the scene, Officers contacted Respondent's husband, T.B., who was
12 standing near Respondent's vehicle. Officers asked T.B. what had occurred, and T.B. told
13 officers that he is married to Respondent and that the two of them resided at 38 Lyndhurst,
14 Newport Beach, CA. T.B. told officers that Respondent was visiting her mother in the City of
15 Costa Mesa, and that Respondent contacted T.B. by phone to inform him that she and her mother
16 had gotten into a "huge argument." T.B. became concerned for Respondent and drove to
17 Respondent's mother's house in Costa Mesa, arriving at approximately 1000 hours. T.B. told
18 officers that Respondent was "fine" and "coherent" when he arrived at Respondent's mother's
19 house. T.B. convinced Respondent to go home and the two left with T.B. following Respondent
20 to their residence in Newport Beach. Officers asked T.B. if he had seen Respondent drinking that
21 evening, and T.B. stated, "No." Officers asked T.B. if he thought Respondent might have
22 consumed alcoholic beverages, and T.B. responded, "I anticipate she was drinking." T.B. told
23 officers that Respondent was driving eastbound on Bonita Canyon Road and reached Mesa View
24 Drive, and that Respondent entered the left turn lane with a red light but stopped her vehicle in
25 the crosswalk. T.B. told officers that he became concerned that Respondent might drive into the
26 intersection, so he exited his vehicle and knocked on Respondent's window to advise Respondent
27 that she had passed the limit line and needed to back up. The light then phased to green and both
28 Respondent and T.B. turned into the complex, and Respondent continued to drive down Mesa

1 View Drive and that Respondent's vehicle "just ended up on the sidewalk." T.B. told officers
2 that Respondent had a prior arrest for driving under the influence of alcohol in February of 2008.

3 18. Officers contacted witness D.B., who advised officers that he was driving eastbound
4 on Bonita Canyon Drive and entered the left turn lane at Mesa View Drive, when he observed
5 T.B. exit his vehicle at the red light and approach Respondent's vehicle. D.B. stated that the two
6 exchanged words and then drove into the complex. D.B. told officers that Respondent was
7 driving "all over the road" and that he became concerned for everyone's safety and contacted
8 police.

9 19. While Respondent was still seated on the curb, officers asked Respondent if she had
10 her driver's license in her vehicle, and she stated she did. Officers asked Respondent if they
11 could retrieve her driver's license from her vehicle, and Respondent stated her driver's license
12 was in her purse inside the vehicle. As officers looked through Respondent's vehicle for
13 Respondent's purse, they located an unsealed bottle of Smirnoff cranberry vodka on the rear
14 passenger floor board. Officers also located a water bottle that was half full in the front cup
15 holder. Officers removed the lid to the bottle and smelled a strong odor of alcohol coming from
16 inside the bottle. Officers were not able to locate Respondent's purse.

17 20. Officers formed the opinion that Respondent was under the influence of an alcoholic
18 beverage and Respondent was placed under arrest for driving under the influence of alcohol.
19 Officers recovered the wine bottle opener, the bottle of Smirnoff vodka and the water bottle
20 containing alcohol and booked the evidence into the Newport Beach Police Department property
21 as evidence. Because of the location where Respondent's vehicle was located on the sidewalk,
22 the symptoms of alcohol intoxication Respondent exhibited, the evidence found in Respondent's
23 vehicle, and all parties' statements, officers formed the opinion that Respondent drove her vehicle
24 while under the influence of alcohol. Officers provided Respondent's husband, T.B., with the
25 keys to the vehicle and released the vehicle to him.

26 21. Officers advised Respondent of her chemical rights, and Respondent was unable to
27 answer officers' questions. Respondent was transported to Hoag Hospital for medical clearance.
28 Officers once again advised Respondent of her chemical rights and Respondent agreed to submit

1 to a blood test. A blood sample was taken and forwarded to the Orange County Sheriff's Office
2 for toxicological testing purposes. Respondent was medically cleared at Hoag Hospital and
3 subsequently transported to and booked at the Newport Beach Police Department jail.

4 22. As a result of the conviction Respondent was placed on three (3) years informal
5 probation and ordered to serve 60 days in the Orange County Jail with two days credit for time
6 served, violate no laws, pay various fines and fees, not drive a motor vehicle with a measurable
7 amount of alcohol or drugs in blood, submit to a chemical test of blood, breath or urine on
8 demand of any peace officer or probation officer, not drive without proof of valid auto liability
9 insurance or financial responsibility as required by law, use true name and date of birth at all
10 times, and to disclose the terms and conditions of probation when asked by any law enforcement
11 or probation officer. The Court also ordered Respondent to attend and complete an 18-month
12 Multiple Offender Alcohol Program, attend and complete five self-help meetings such as
13 Alcoholics Anonymous meetings in lieu of MADD victim panel, and to wear an Alcohol
14 Monitoring Device from home confinement if placed on home confinement.

15 **SECOND CAUSE FOR DISCIPLINE**

16 **(Use of Alcohol in a Manner Dangerous and Injurious**
17 **to Oneself, to Any Other Person Or to the Public)**

18 23. Respondent has subjected her license to disciplinary action under section 4301,
19 subdivision (h), of the Code in that on or about February 15, 2008, and December 24, 2010,
20 Respondent drove a vehicle with a blood alcohol content of 0.26% and 0.20%, respectively,
21 which posed a serious risk of injury and/or death to herself, to any other person or to the public
22 and to the public, as detailed in paragraphs 13-22, above, and 25-35, below, which are
23 incorporated here by reference.

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THIRD CAUSE FOR DISCIPLINE

(Multiple Convictions Involving the Use of Alcoholic Beverages)

24. Respondent has subjected her license to disciplinary action under section 4301, subdivision (k), of the Code in that on or about February 15, 2008 and December 24, 2010, Respondent was convicted in two separate cases on charges involving the consumption of alcoholic beverages, as detailed in paragraphs 19 and 28, above, and 31-41, below, which are incorporated here by reference.

DISCIPLINARY CONSIDERATIONS

25. To determine the degree if discipline, if any, to be imposed on Respondent for the violations alleged above, pursuant to California Code of Regulations, title 16, section 1769, Complainant alleges:

26. On or about September 22, 2009, in the matter entitled "*In the Matter of the Citation Against Mary Pat Higley*," the Board of Pharmacy issued Citation No. CI 2007 37082 to Respondent pursuant to Code section 125.9 and California Code of Regulations, title 16, section 1775, et seq., for violation of Business and Professions Code section 4301, subdivisions (h) and (l) (Unprofessional Conduct – Administering to oneself alcoholic beverages to the extent or in a manner as to be dangerous or injurious to oneself or to any other person or to the public and Conviction of a Crime Substantially Related to the Qualifications, Functions and Duties of a Pharmacist, respectively).

27. The circumstances are that on February 15, 2008, at approximately 1648 hours, Costa Mesa Police Department officers responded to a call regarding a possible drunk driver being followed in the area of Harbor Boulevard and Adams Avenue in the City of Costa Mesa, CA. Witnesses informed dispatch that the vehicle drove eastbound on Adams Avenue and struck the curb several times, then drove up onto the sidewalk at Fairview Road and Adams Avenue, and continued eastbound on El Camino Drive running several stop signs. The vehicle stopped at LaSalle Avenue and Sonora Road. One of the witnesses that was following the vehicle walked up to the vehicle and took the keys out of the ignition and reported to dispatch that a child was observed in the back seat of the vehicle.

1 28. When officers arrived at the scene, they observed the driver of the vehicle, identified
2 as Respondent, seated on the curb at the rear of the vehicle. Officers talked to Respondent to find
3 out what had happened. Respondent told officers she was going home. Officers asked
4 Respondent where she was and she told officers she thought she was on Irvine Avenue. Officers
5 could see that Respondent's eyes were red and watery and that her face was flushed. Officers
6 smelled the strong odor of an alcoholic beverage on Respondent's breath as she spoke to them.

7 29. While Respondent was still seated on the curb, officers performed a horizontal gaze
8 nystagmus (HHN) and a vertical gaze nystagmus (VGN). Respondent's eyes remained fixed
9 straight ahead and her eyes did not follow the stimulus. Officers asked Respondent to stand up
10 and Respondent started to stand up and fell back to the seated position. Respondent was unable
11 to stand on her own without support. Since Respondent was unable to maintain her own balance,
12 and for her safety, officers did not administer the walk and turn or one leg stand field sobriety
13 tests. Respondent was unable to perform these tests due to her intoxication.

14 30. Respondent agreed to take a breathalyzer test and blew 0.24% at 1716 hours and a
15 0.22% at 1719 hours. After the second test, officers realized that the tests were lacking the 0.02
16 BAC agreement required for the test to be valid. A third test was needed, however, the third test
17 was not completed and the test was void. At the time officers discovered the test was void, they
18 had already placed Respondent under arrest for driving under the influence of alcohol and for
19 child endangerment. Respondent was transported to the Costa Mesa Police Department for
20 booking and for a blood test. A blood technician arrived and took a blood sample from
21 Respondent's right arm at 1803 hours. The blood sample was placed into Vial #531384.
22 Respondent's blood alcohol content was determined to be 0.26% BAC. Respondent was later
23 booked at the Orange County Jail.

24 31. Officers that remained on the scene spoke to witnesses who saw Respondent driving.
25 The first witness, T.O., saw Respondent driving northbound on Harbor Boulevard and make a
26 right hand turn into the oncoming lanes of westbound Adams Avenue. Respondent's vehicle
27 then stopped, backed up, and turned into the eastbound Adams Avenue lanes and drove
28 eastbound. T.O. followed Respondent's vehicle and watched as it collided with the curb several

1 times on Adams Avenue between Harbor and Fairview Roads. The vehicle continued eastbound
2 across Fairview Road and drove up onto the sidewalk and curb at Fairview Road and El Camino
3 Drive almost striking several pedestrians. The vehicle continued eastbound on El Camino Drive
4 and ran one of the stop signs. The vehicle turned left onto LaSalle Avenue at El Camino Drive
5 and pulled over towards the curb in a red zone. T.O. got out of the car and walked up to the
6 driver's window of the vehicle that she was following. T.O. positively identified Respondent as
7 the person driving the vehicle she was following. T.O. removed the keys from the ignition and
8 saw that there was a small child in the back seat of the vehicle.

9 32. Witness A.V. told officers similar sequence of events as that of witness T.O., adding
10 that Respondent ran several stop signs, almost struck several vehicles, and almost struck
11 pedestrians several times on Adams Avenue when Respondent's vehicle hit the curb three or four
12 times. Witness A.V. positively identified Respondent as the person driving the vehicle. Witness
13 A.V. requested prosecution of Respondent and signed the Citizen's Arrest form.

14 33. The child in the back seat of Respondent's vehicle was identified as Respondent's
15 ten-year-old daughter, A.B. A.B. told officer she was going home after school at Christ Lutheran
16 School. A.B. was released to her father, T.B., at the scene. T.B. moved Respondent's vehicle
17 from the red curb and later drove it from the scene.

18 34. On February 16, 2008, Costa Mesa Police Department personnel contacted Social
19 Services and provided Social Services with a verbal report of Respondent's arrest the previous
20 day.

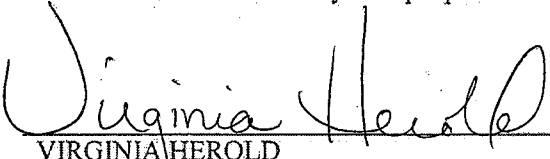
21 35. The above arrest resulted in a conviction as follows: On or about April 14, 2008, in a
22 criminal proceeding entitled *People of the State of California v. Mary Pat Higley*, in the Orange
23 County Superior Court, Harbor Justice Center, Newport Beach Facility, in Case No. 08HM01688
24 M A, Respondent was convicted on her plea of guilty to violating Penal Code section 273a(b)
25 (child abuse and endangerment) and Vehicle Code section 23152(a) (driving under the influence
26 of alcohol), misdemeanors. As a result of Respondent's plea, the Court dismissed a charge that
27 had originally been filed for violation of Vehicle Code section 23152(b) (driving under the
28 influence of alcohol with a blood alcohol content of 0.08% or more).

PRAYER

WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged, and that following the hearing, the Board of Pharmacy issue a decision:

1. Revoking or suspending Original Pharmacist License Number 37064, issued to Mary Pat Higley;
2. Ordering Mary Pat Higley to pay the Board of Pharmacy the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3;
3. Taking such other and further action as deemed necessary and proper.

DATED: 1/2/12


VIRGINIA HEROLD
Executive Officer
Board of Pharmacy
Department of Consumer Affairs
State of California
Complainant

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